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CHARLES ELMORE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 131.

AMERICAN SURETY COMPANY OF NEW YORK Petitioner,

v.

TERESA MAROTTA.

BRIEF FOR AMERICAN SURETY COMPANY OF NEW YORK, PETITIONER.

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OCTOBER TERM, 1932.

AMERICAN SURETY COMPANY OF NEW YORK, PETITIONER.
v.
TERESA MAROTTA.

No. 131.

BRIEF FOR AMERICAN SURETY COMPANY OF NEW YORK, PETITIONER.

I.

THE OPINIONS OF THE COURT BELOW.

This case comes before the Court for hearing on the merits on a writ of certiorari issued to review a judgment of the Circuit Court of Appeals for the First Circuit.

The opinions in the Circuit Court of Appeals are reported in 57 F. (2d) 829. The opinion of the majority of the Court is printed in the record at pages 133–139 and the dissenting opinion at pages 139–141.

II.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based on the Judicial Code, section 240, as amended by the Act of February 13, 1925 (43 Stat. 936). The material portion of this section is as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree

by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The date of the judgment of the Circuit Court of Appeals which the petitioner seeks to review is April 4, 1932 (R. 141). The petition for certiorari was filed in this Court on June 3, 1932, and was granted on October 10, 1932.

III.

STATEMENT OF THE CASE.

This is a petition in bankruptcy originally brought by the petitioner, the American Surety Company of New York, in the District Court for the District of Massachusetts against Teresa Marotta (hereinafter called "the alleged bankrupt" and "the respondent"). The petitioner is a corporation organized under the laws of the State of New York and engaged in the business of acting as surety on bonds. The alleged bankrupt, Teresa Marotta, is a resident of Winthrop in the Commonwealth of Massachusetts.

The petition in bankruptcy was filed on July 16, 1930. The act of bankruptcy claimed is that the alleged bankrupt, on March 18, 1930, and within four months next preceding the date of the petition, transferred and conveyed certain real estate owned by her with intent to hinder, delay or defraud her creditors, including the petitioner (R. 1–4). The alleged bankrupt filed an answer denying that she had committed the act of bankruptcy alleged or that she was insolvent and denying that the petitioner was a creditor or had a provable claim against her (R. 4–5). The case was tried before a Special Master whose report is found in the record at pages 5–23. The District Court heard the case on the report of the Special Master and on the evidence taken before him, and on June 24, 1931, ordered that Teresa Marotta be adjudicated bankrupt (R. 33). The District

Court made special findings of fact printed in the record at pages 34–42, but rendered no opinion. On appeal taken by the respondent the Circuit Court of Appeals, by a final decree entered on April 4, 1932, reversed the decree of the District Court and instructed that court to dismiss the petition (R. 141). The Circuit Court of Appeals raised no question as to the accuracy of the findings of the District Court, but ruled that as a matter of law the facts found did not warrant an adjudication of bankruptcy (*cf.* R. 133–139).

The Facts as Found by the District Court.

The District Court found the material facts as follows (R. 34–42):

1. The petitioning creditor, the American Surety Company of New York, is a corporation organized under the laws of the State of New York and authorized to transact business in the Commonwealth of Massachusetts and engaged in the business of acting as surety on bonds.

2. The alleged bankrupt, Teresa Marotta, is a resident of Winthrop in the Commonwealth of Massachusetts and resided there for the greater portion of the six months preceding the filing of the petition. She was not at the date of the filing of the petition, or since that time, a wage earner or engaged chiefly in farming or tillage of the soil.

3. The creditors of Teresa Marotta at the time of the filing of the petition were less than twelve in number. At the time of the filing of the petition, the alleged bankrupt had no creditors other than the petitioner.

4. Teresa Marotta is the wife of Arcangelo Marotta. Both Teresa Marotta and Arcangelo Marotta are illiterate and unable to read or write either English or Italian or to sign their names except by a mark. Teresa Marotta, although she has lived in this country over thirty years, neither speaks nor understands English except to a very limited extent.

5. In 1906 Arcangelo Marotta purchased real estate, part of

that described in the alleged act of bankruptcy, which was put in the name of Teresa Marotta. This property, which was and is of considerable value, is situated on Lewis Street and Fulton Street in Boston and consists of two parcels, one of which is hereinafter referred to as the Lewis Street property, and the other as the Fulton Street property. In 1919, Arcangelo Marotta purchased a house in Winthrop, where he and his wife resided, which was also put in the name of Teresa Marotta. Arcangelo Marotta in 1906 and thereafter until the prohibition amendment, was in the saloon business. Since then he has been a wholesale dealer in ginger ale, moxie and "near beer." The details of management of all the real estate, collection of rents, payment of taxes and interest on the mortgages, have always been managed by him.

6. In the spring of 1927 one Mario Mogliani was in the fireworks business in Providence, Rhode Island. Antonio Natale, who was in the employ of Mogliani, went to Arcangelo Marotta, a few days before April 15, 1927, and, as a result of a talk with Arcangelo Marotta, took Arcangelo Marotta and Teresa Marotta to a lawyer with whom he was acquainted, Mr. William J. Good. Teresa Marotta, on April 15, 1927, executed, in Mr. Good's presence an instrument which was introduced in evidence as exhibit 6 (R. 90A). By the terms of this instrument (hereinafter referred to as the indemnity agreement) she agreed to indemnify the petitioner against any claim or liability arising from the execution of a fireworks bond to the Commonwealth of Massachusetts, on which bond Mario Mogliani was to be the principal and the petitioner was to be the surety, and against any claim or liability arising from other suretyship in lieu of said bond. Among the clauses in this indemnity agreement to which Mrs. Marotta agreed was the following:

> "VI. That this agreement shall cover not only the suretyship above recited, but all alterations, renewals, extensions or modifications thereof which may be requested or assented to by the principal named in such obligation."

7. At the time when Teresa Marotta executed the indemnity agreement, she also executed a statement of her financial condition which was introduced in evidence as exhibit 7 (R. 90D). In this financial statement her assets were given as follows: Cash, $8,000; Land and improvements, at market $75,000; Additional real estate, $15,500. Both papers were signed by Teresa Marotta by her mark in the presence of Mr. Good.

8. At the time the indemnity agreement, exhibit 6, was signed by Teresa Marotta, it did not contain the words on page 1, "Prov. R. I. April 18 1927", nor the date "April 18 1927" on the third page, nor the signature "Mario Mogliani", nor that of "Raymond Buss", witness to Mogliani. In all other respects the instrument was as it now appears.

9. The information now found in exhibit 7 with reference to the real estate and its value was given by Arcangelo Marotta to Mr. Good in the presence of Teresa Marotta and was written down by Mr. Good in the presence of both. Mr. Good was satisfied at the time that Mrs. Marotta knew the general substance and nature of the papers which she was signing. Mr. Good was not acting in the matter as an agent or attorney of the Surety Company and no agent or representative of the Surety Company was present at the time these papers were signed.

10. Both Arcangelo Marotta and Teresa Marotta knew the nature of the instruments which she signed.

11. Both Arcangelo Marotta and Teresa Marotta represented that she owned the property listed on exhibit 7 for the purpose of inducing the petitioner to accept the indemnity agreement, exhibit 6, and to write a bond in reliance on such representations.

12. After the execution of the two papers, exhibit 6 and exhibit 7, in Mr. Good's office, they were delivered to Mr. Natale who sent them to Raymond Buss in Providence, Rhode Island. Mr. Buss was the resident agent and manager of the American Surety Company for the State of Rhode Island. Exhibit 6 was

completed by employees of the petitioner in its Providence office as to the place and date on page 1 of exhibit 6, and was signed, sealed and delivered by Mogliani in Providence in the presence of Mr. Buss on April 18, 1927.

13. The "fireworks bond" referred to in exhibit 6 is the statutory bond required by the provisions of the Massachusetts statutes (Acts of 1921, c. 500) as a condition precedent to the giving of a permit for a public display of fireworks in Massachusetts.

14. On April 18, 1927, Raymond Buss, acting for the petitioner, delivered to Mario Mogliani a written instrument (hereinafter called "the bond") which was subsequently filed by Mogliani with the Treasurer and Receiver General of the Commonwealth of Massachusetts and approved by the State Fire Marshall and the Treasurer and Receiver General at some time before September 26, 1927.

15. Before this bond was delivered by Buss to Mogliani, it had been signed and sealed by the petitioner acting by its resident vice-president and its resident assistant secretary in Massachusetts, who were authorized to execute such bonds. It had also been signed by Mogliani, but had not been sealed by him by the affixing of a wafer or other seal. The word "Seal" which appears opposite his signature in exhibit 1 (R. 86A) was printed on the blank before he signed it.

16. In executing this bond, the petitioner relied on the indemnity agreement, exhibit 6, and on the statements as to the property of Teresa Marotta which were contained in the financial statement, exhibit 7.

17. The petitioner, acting through Raymond Buss, its authorized agent, delivered the bond to Mario Mogliani knowing that there was no seal against Mogliani's name and knowing also that Mogliani intended to file this bond immediately at the State House at Boston; and the petitioner intended to be bound by the bond in the condition in which it then was.

18. Said bond was filed with the Treasurer and Receiver

General of the Commonwealth of Massachusetts in the same condition in which it was delivered by Buss to Mogliani. A copy of said bond (except for the seal of the petitioner) was introduced in evidence as exhibit 1 and is made a part hereof. This copy which was a photostat, does not show the seal of the petitioner which was affixed to the original bond. The form of the bond, as it was delivered to the Treasurer and Receiver General, was assented to by Mario Mogliani, who had caused it to be delivered.

NOTE: A copy of the exhibit referred to in this finding of the District Court is found on page 86A of the record. The condition of the bond is as follows: "The Condition of this Obligation is such that if the said Mario Mogliani d/b as Centredale Fireworks Company, his heirs, executors and administrators, successors and assigns, shall pay any judgment obtained in an action brought against the said Principal for discharging, firing-off, exploding or displaying fireworks at any public exhibition or exhibitions thereof, for or on account of any loss, damage, or injury resulting to persons or property by reason of the said discharging, firing-off, exploding or displaying of said fireworks, at said public exhibition or exhibitions; provided that said judgment is obtained in an action brought within a period of twelve months following the date of the public exhibition or exhibitions, at which the cause of said action is alleged to have occurred, then this obligation shall be void, otherwise it shall remain in full force and effect."

19. On September 26, 1927, one Beatrice Ricci was injured by the discharging of fireworks under the direction of Mogliani at a public exhibition of fireworks in Everett, Massachusetts. Sometime in October, 1927, the petitioner notified Arcangelo Marotta, by letter, of the accident.

20. On March 15, 1928, Raymond Buss, acting for the petitioner, wrote Teresa Marotta a letter which was introduced in evidence as exhibit 3 (R. 87) and is made a part hereof, notifying her that a claim had been presented on behalf of Beatrice

Ricci and referring to the indemnity agreement which had been signed by Teresa Marotta.

21. On July 21, 1928, Arcangelo Marotta, who knew at the time the contents of the letter, exhibit 3, acting as agent for Teresa Marotta as well as for himself, caused to be written to Mr. Buss a letter which was introduced in evidence as exhibit 4 (R. 88A). Mr. Buss replied by a letter dated August 1, 1928, which was introduced in evidence as exhibit 5 (R. 89). Mr. and Mrs. Marotta received this letter but did not reply to it.

22. On April 12, 1928, Beatrice Ricci brought an action in the Superior Court for Middlesex County, Massachusetts against Mario Mogliani to recover for the injuries received by her on September 26, 1927, from the discharge of fireworks at said exhibition in Everett. A copy of the record in this case was introduced in evidence as exhibit 8 (R. 93–103). Before this suit was tried, the attorney for Mogliani told Arcangelo Marotta that Mrs. Marotta was on the bond, that the case was about to go to trial and he thought a verdict for a very large sum was likely to be rendered against the defendant, and he asked Marotta whether he wanted to get his own attorney. Marotta told Mogliani's attorney to go ahead and try the case. Arcangelo Marotta attended the trial of the case, which lasted several days. On March 4, 1930, the jury brought in a verdict for $10,000 against Mario Mogliani.

23. During the progress of the trial Arcangelo Marotta consulted Frank P. Fralli, an attorney-at-law, stating that his wife had signed a paper. After the verdict Marotta saw Fralli again and, as a result, Fralli went to Providence and investigated the situation and urged the attorney for Mogliani to move for a new trial. Such a motion was made and on March 29, 1930, the Court ordered the verdict cut down to $6500. As a part of the services performed for Marotta, Fralli negotiated with counsel for the plaintiff in the Ricci suit.

24. The acts of Arcangelo Marotta relating to the action

brought by Beatrice Ricci against Mario Mogliani were done as agent for Teresa Marotta.

25. The property which was purchased by Arcangelo Marotta, as stated in finding 5 above, belonged to Teresa Marotta from the time it was acquired and placed in her name in 1906 and 1919. This was the same real estate which was described in the financial statement, exhibit 7.

26. On February 23, 1928, Teresa Marotta executed a deed to her husband of property on Lewis Street, Boston, being the first two items described in the indemnity agreement, exhibit 7. This conveyance was not made with intent to hinder, delay or defraud creditors. This deed was introduced in evidence as exhibit 21 (R. 130).

27. On March 15, 1930, twelve days after the verdict in the Ricci suit, Arcangelo Marotta went to one Zottoli, a lawyer, and, as a result of the talk between them, a declaration of trust was drawn by Zottoli which Arcangelo Marotta executed on March 15, 1930. A copy of this declaration of trust was introduced in evidence as exhibit 14 (R. 118). By this instrument Marotta declared that he held the land described therein, together with any other property which he might afterward acquire as trustee to support and maintain the children of Arcangelo and Teresa Marotta. The trust, under its terms, was to terminate when the youngest child attained the age of twenty-one years and the property was to be distributed among the children.

28. On March 18, 1930, Teresa Marotta and Arcangelo Marotta conveyed to Pellegrino Muollo (by a quitclaim deed a copy of which was introduced in evidence as exhibit 10 (R. 110) the three parcels of real estate, namely (1) the home in Winthrop purchased in 1919 and still in the name of Teresa Marotta; (2) the Fulton Street property in Boston purchased in 1906 (being the parcel designated as 247–251 North Street in exhibit 7), title to which was still in her name; and (3) the Lewis Street property purchased in 1906 (being the first and

second items of real estate described in exhibit 7), which had been conveyed in 1928 by Mrs. Marotta to her husband. On the same day Muollo executed an alleged mortgage to Marciano Grella of the Winthrop home for a consideration stated as eight thousand dollars. A copy of this mortgage was introduced in evidence as exhibit 12 (R. 114). At the same time Muollo also executed an alleged mortgage on the Lewis Street property for twenty thousand dollars ($20,000) to Nicola Dello Russo. A copy of this mortgage was introduced in evidence as exhibit 11 (R. 112). Muollo then executed a quitclaim deed to Arcangelo Marotta, as trustee under the declaration of trust described in the preceding finding, of the Lewis Street and Fulton Street properties and the Winthrop home. A copy of this deed was introduced in evidence as exhibit 13 (R. 115). These instruments were all prepared by Mr. Zottoli, were all dated March 18, 1930, and were recorded on March 19, 1930, at which time said declaration of trust was also recorded.

29. The arrangements for the drawing of the documents referred to in the two preceding findings were made by Arcangelo Marotta acting as agent for Teresa Marotta.

30. All of the conveyances described, in finding 28, including the deed which was signed by Teresa Marotta, were made without consideration, and both Muollo, the grantee, and the two mortgagees were straws who acted as a favor to and at the request of Arcangelo Marotta. Teresa Marotta had no property on March 18, 1930, other than her interest in the real estate described in such conveyances. These conveyances, including the deed from Arcangelo Marotta and Teresa Marotta to Muollo, were made with the specific intent by Teresa Marotta to place the property conveyed beyond the reach of the petitioner, and to hinder, delay and defraud the petitioner.

31. On April 10, 1930, judgment was entered for the plaintiff in the suit of *Beatrice Ricci* v. *Mario Mogliani* for $6540.08, with costs taxed at $110.40, and execution was issued. Counsel for Beatrice Ricci made a demand through an officer on Mogliani

to collect this judgment and, being unsuccessful, made demand upon the petitioner. On April 18, 1930, an action was brought against the petitioner in the Municipal Court of the City of Boston in accordance with statutory requirements on the bond filed by Mogliani with the Treasurer and Receiver General, for the benefit of Beatrice Ricci. On the same day, after this suit was brought, the petitioner paid the amount of the Ricci execution to counsel for Beatrice Ricci. On April 30, 1930, an agreement for judgment for the plaintiff for $6653.78 was filed in said action in the Municipal Court of the City of Boston. This was the amount which had been paid by the petitioner on the Ricci execution.

32. On April 9, 1930, the petitioner filed a bill in equity in the Superior Court for Suffolk County, Massachusetts, against Teresa Marotta and others, praying that the conveyances and mortgages described in finding 28 above should be set aside as fraudulent, and filed a notice of this bill in the Registry of Deeds for Suffolk County. No injunction was issued in this suit and it has not been tried.

33. On May 15, 1930, after the payment by the petitioner of the amount of the Ricci judgment, the petitioner filed a second bill in equity in the Superior Court for Suffolk County against Teresa Marotta and others, seeking to recover the amount paid by the petitioner and to reach and apply the real estate transferred by said conveyances in satisfaction of the petitioner's claims against Teresa Marotta under her indemnity agreement. The petitioner alleged in this bill that said real estate had been fraudulently conveyed by Teresa Marotta. In this suit a temporary injunction was issued on May 22, 1930, against Arcangelo Marotta and the straw mortgagees, restraining them from conveying or encumbering said real estate or foreclosing the mortgages and notice of the bringing of this bill in equity was also filed in the Registry of Deeds for Suffolk County on May 15, 1930. This suit is still pending and has not been tried.

34. As a result of the conveyances made on March 18, 1930, Teresa Marotta was then insolvent.

Certain of these findings were objected to by the respondent as not warranted by the evidence. The objections raised to these findings are discussed later in this brief.

The Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals reversed the decision of the District Court, which had adjudicated Teresa Marotta to be a bankrupt, and ordered that the petition in bankruptcy be dismissed. The majority in the Circuit Court of Appeals held that the petitioner's claim was contingent on March 18, 1930, the date of the alleged transfer; that therefore the petitioner had no claim provable in bankruptcy on that date; and that as there were no other creditors of Teresa Marotta at the time, the transfer was not an act of bankruptcy. The decision is based solely on the ground that a fraudulent transfer, to constitute an act of bankruptcy, must hinder, delay or defraud a creditor *holding a claim provable in bankruptcy at the time the transfer is made.* The majority of the Court, while conceding that a transfer made with a specific intent to defraud a contingent creditor or a subsequent creditor may be set aside at common law and under the Statute of Elizabeth, held that such a transfer is not an act of bankruptcy under section 3a (1) of the Bankruptcy Act (R. 133–139). Morton J. dissented, contending that the first act of bankruptcy is identical with the fraudulent conveyance of the Statute of Elizabeth and the common law (R. 139–141).

IV.

SPECIFICATION OF ERRORS.

The petitioner contends that the Court below erred in the following respects:

1. The Court below erred in ruling that the transfer by the alleged bankrupt, Teresa Marotta, of all her property made with the specific intent to hinder, delay and defraud the petitioner, within four months of the filing of the petition, would not constitute an act of bankruptcy under section 3a (1) of the Bankruptcy Act unless the petitioner had at the time of the transfer a claim which would be provable in bankruptcy.

2. The Court below erred in ruling that the term "creditors" as used in section 3a (1) of the Bankruptcy Act was confined to creditors having claims which would be provable in bankruptcy at the date of the transfer referred to in said section.

3. The Court below erred in ruling that the claim of the petitioner under the indemnity agreement signed by Teresa Marotta was not a claim which was provable in bankruptcy at the date on which she transferred her property.

4. The Court below erred in failing to find and rule that the petitioner was a creditor of Teresa Marotta on March 18, 1930, the date of the transfer which she made.

5. The Court below erred in failing to find and rule that the conveyance made by Teresa Marotta on March 18, 1930, was made with intent to hinder, delay and defraud a creditor and was an act of bankruptcy.

6. The Court below erred in failing to find and rule that the petitioner was a creditor entitled to maintain the petition at the time when the petition was filed, and that Teresa Marotta was properly adjudicated bankrupt by the District Court for the District of Massachusetts.

V.

ARGUMENT.

The question involved is one of great importance. It often happens that a debtor has a few small creditors whom he can readily pay, and a large contingent liability. Illustrations are found in the cases of sureties on probate bonds and fidelity bonds, persons who have entered into hazardous contracts which are being performed at the moment but which may prove in the future to be beyond their power to perform, and, in general, indemnitors against possibilities. The decision of the Circuit Court of Appeals, if it is not reversed, leaves the door open for such persons to evade the Bankruptcy Act by paying off all debts presently due and transferring all their property before their contingent liabilities mature.

The petitioner contends that the Circuit Court of Appeals was in error in ruling that the transfer by the alleged bankrupt of her property with the specific intent to hinder, delay or defraud the petitioner would not constitute an act of bankruptcy unless the petitioner had at the time a claim which would be provable in bankruptcy, and was also in error in ruling that the claim which the petitioner then had was not one which would be provable in bankruptcy. The petitioner further contends that on the facts found by the District Court and the record in the case the Circuit Court of Appeals should have found and ruled that the petitioner was a creditor of Teresa Marotta when she transferred her property and when the petition was filed; that this transfer was made with intent to hinder, delay or defraud a creditor and was an act of bankruptcy; that the petitioner was entitled to maintain the petition; and that the respondent was properly adjudicated a bankrupt by the District Court.

Statutes Involved.

The principal statutes involved are as follows:

Section 3. Acts of Bankruptcy.— a. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; . . . (U. S. Code, Title 11, c. 3, § 21: Act of July 1, 1898, c. 541, § 3, 30 Stat. 546).

Section 59. b. Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt. (Act of July 1, 1898, c. 541, § 59, 30 Stat. 561; June 25, 1910, c. 412, § 101, 36 Stat. 841: United States Code, Title 11, c. 6, § 95.)

Section 1. Meaning of words and phrases. The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the Court of Appeals of the District of Columbia, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships

and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint stock companies, unincorporated companies and associations, and any business conducted by a trustee, or trustees, wherein beneficial interest or ownership is evidenced by certificate or other written instrument; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories and possessions to which this title is or may after July 1, 1898, be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska; (9) "creditor" shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this title; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized

by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this title, or by creditors, alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this title, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) States shall include the Territories and possessions to which this title is, or may after July 1, 1898, be, applicable, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding $1,500 per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things. (United States Code, Title 11, c. 1, § 1: July 1, 1898, c. 541, § 1, 30 Stat. 544; Apr. 12, 1900, c. 191, § 34, 31 Stat. 85; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; May 27, 1926, c. 406, § 1, 44 Stat. 662.)

Other statutes are quoted below in those portions of the argument to which they particularly apply.

A. The Circuit Court of Appeals erred in ruling that the transfer by the alleged bankrupt of all her property with the specific intent to hinder, delay or defraud the petitioner would not constitute an act of bankruptcy unless the petitioner had at the time of the transfer a claim which would be provable in bankruptcy.

The reasoning of the majority in the Circuit Court of Appeals is as follows:

Section 3 of the Bankruptcy Act provides that the first act of bankruptcy shall consist of a conveyance by a person of any part of his property "with intent to hinder, delay or defraud his creditors, or any of them". Section 1 (9) of the Act provides that as used in the Act the word "creditor" "shall include anyone who owns a demand or claim provable in bankruptcy . . ." From these premises the majority of the Court drew the inference that the word "creditors" in section 3 meant only those persons having claims provable in bankruptcy and that the expression "hinder, delay or defraud his creditors, or any of them" in that section did not apply to a transfer made with an actual intent to defraud a person who was only a contingent creditor having no provable claim at the time. The Court ruled that on March 18, 1930, the petitioner's claim against the respondent was contingent, that the actual intent to defraud the petitioner which the respondent had was not an intent to defraud a "creditor" as defined in the Bankruptcy Act; and that as the respondent had no other creditors at the time of the transfer which she made, this transfer was not an act of bankruptcy (R. 137–139).

It is submitted that this ruling as to the meaning of the expression "hinder, delay or defraud his creditors" was erroneous, and that the expression, when correctly interpreted, covers such a transfer as is found in the case at bar. It is clear that at common law and under the Statute of Elizabeth, which was declaratory of the common law, a transfer is voidable if made

with actual intent to defraud a creditor having a contingent claim or even a future creditor. This was recognized in both the majority and the minority opinions of the Circuit Court of Appeals (R. 138–140). A few of the decisions which support this proposition are cited below:

McLaughlin v. *The Bank of Potomac*, 7 How. 220.
Smith v. *Vodges*, 92 U. S. 183.
Mowry v. *Reed*, 187 Mass. 174.
Thomson v. *Crane*, 73 Fed. 327.

It is an established rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body.

Kepner v. *United States*, 195 U. S. 100, 124.

It is submitted that the language of section 1 (9) of the Bankruptcy Act does not require that the word "creditors" in section 3 a(1) shall be limited to persons having provable claims. In the first place it is to be noted that the verb "shall include" as used in section 1 does not necessarily mean "shall include only". A careful distinction is made in section 1 in the use of the verbs "shall include" and "shall mean". Where Congress intended that a word should describe a definite class and no more, the verb "shall mean" is used; and where the intention was that a word should describe certain classes without any implication that it should exclude all others, the verb "shall include" has been used. For illustration, subsection 19 provides, " 'persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations;". It will be noted that although women are

expressly mentioned in this subsection, men are not. No one has ever suggested, however, that this shows an intent to exclude men from the operation of the Bankruptcy Act. Again subsection 17 reads "'oath' shall include affirmation". It could not be argued seriously that "oath" means affirmation *only*. A reading of section 1 as a whole (printed in this brief at pages 15–17) will emphasize the distinction between the use of the verbs "shall mean" and "shall include". In subsections 6 and 7 above, both verbs are used in a way that further illustrates the point which has been made. In view of the fact that the verb "shall include" is used in subsection 9 and the verb "shall mean" is not used, it is submitted that there is no sound basis for the reasoning that was adopted by the majority in the Circuit Court of Appeals.

The decision of the majority in the Court below also apparently overlooked the effect of the first four lines of section 1 which read as follows: — "The words and phrases used in this title and in proceedings pursuant thereto shall, *unless the same be inconsistent with the context*, be construed as follows:" (italics ours).

The word "creditors" as used in the expression "with intent to hinder, delay or defraud creditors" has a well known judicial meaning. To give the word another meaning is to interpret it so that it is inconsistent with its context. The language used at the beginning of section 1 shows that no such interpretation was intended by Congress.

The proposition that the expression "hinder, delay or defraud his creditors" as used in the Bankruptcy Act is to be interpreted in its common law meaning is strongly supported by the decision of this Court in the case of *Coder* v. *Arts*, 213 U. S. 223. In that case the bankrupt, knowing that he was insolvent, gave a mortgage which constituted a preference of the mortgagee over other creditors. The mortgage was not made with any actual intent to hinder, delay or defraud creditors, and the mortgagee had no cause to believe that the mortgagor

was insolvent. The trustee in bankruptcy claimed that the mortgage was void under the following provisions of section 67(e) of the Bankruptcy Act:

> "e. That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; . . ."

It was argued that the intent on the part of the bankrupt to hinder, delay or defraud creditors must be presumed because this was the necessary effect of the mortgage. This Court was of the opinion, however, that the expression "with the intent and purpose on his part to hinder, delay or defraud his creditors" used in section 67e referred to those transfers which according to the common law and the Statute of Elizabeth were regarded as fraudulent, and that as a mortgage given to an existing creditor was not a fraudulent conveyance under the common law and the Statute of Elizabeth in the absence of an actual intent to hinder, delay or defraud, the mortgage in question was valid. In discussing this issue the Court said (213 U. S. 223, at p. 242),

> "We are of opinion that Congress, in enacting § 67e, and using the terms 'to hinder, delay or defraud creditors,' intended to adopt them in their well-known meaning as being aimed at conveyances intended to defraud. In § 60 merely preferential transfers are defined, and the terms on which they may be set aside are provided; in § 67e, transfers fraudulent under the well-recognized principles of the common law and the statute of Elizabeth are invalidated. The same terms are used in § 3, subdivision 1, in which it is

made an act of bankruptcy to transfer property with intent to hinder, delay or defraud creditors. Such transfers have been held to be only those which are actually fraudulent. It was so held in *Lansing Boiler & Engine Works* v. *Ryerson*, 128 Fed. Rep. 701. Considering the language, which is identical with that in §67e, the Circuit Court of Appeals, speaking through Judge Severens, said:

'The language of subsection 1 of section 2 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words. *Githens* v. *Shiffler*, 112 Fed. Rep. 505.' . . ."

The case of *Lansing Boiler & Engine Works* v. *Ryerson*, 128 Fed. Rep. 701, which is cited in *Coder* v. *Arts*, is a decision of the Circuit Court of Appeals for the Sixth Circuit. In that case the question arose as to whether a certain mortgage given by a corporation constituted an act of bankruptcy under section 3a(1) of the Bankruptcy Act. The Court held that the mortgage in question would not be fraudulent unless there was proof of an actual intent to defraud. The case rests squarely on the ground that a transfer with intent to hinder, delay or defraud which constitutes the first act of bankruptcy which is referred to in section 3a(1) is identical with the transfers which were void under the common law and the Statute of Elizabeth.

It is clear that at common law a surety is the creditor of a person against whom he has a right of indemnity, and is entitled to protection against fraudulent conveyances by his indemnitor from the date when he becomes a surety.

Thomson v. *Crane*, 73 Fed. 327.
U. S. Fidelity & Guaranty Co. v. *Centropolis Bank*, 17 F. (2d), 913.
Yeend v. *Weeks*, 104 Ala. 331.
Washington v. *Norwood*, 128 Ala. 383.
Whitehouse v. *Bolster*, 95 Maine 458.
American Surety Co. of New York v. *Hattrem*, 138 Ore. 358.

B. The Circuit Court of Appeals erred in ruling that the claim of the petitioner under the indemnity agreement signed by Teresa Marotta was not provable in bankruptcy at the date on which she transferred her property because it was contingent.

The conclusion reached by the Circuit Court of Appeals depends on two propositions. The first, namely that a transfer with a specific intent to defraud the petitioner would not be an act of bankruptcy unless the petitioner had a provable claim at the time, has already been discussed. The second proposition on which the decision depends is that the claim which the petitioner had was not provable at the time of the transfer. It is submitted that this proposition also cannot be sustained.

Before March 18, 1930, the date on which the respondent transferred her property, the bond signed by the petitioner had been filed, the injury to Beatrice Ricci had taken place, suit had been brought by her against Mogliani and a verdict had been rendered in that suit for $10,000. Judgment was not entered in the case until April 10, 1930. In the meantime the Court had reduced the amount of the verdict to $6500 (R. 37–41).

The petitioner contends that on March 18, 1930, it had a provable claim on the express contract of indemnity of Teresa Marotta which was within the provisions of section 63 of the Bankruptcy Act. The material portion of this section is as follows:

> "a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause

of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; . . .

"b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate." (Act of July 1, 1898, c. 541, § 63, 30 Stat. 562: United States Code, Title 11, c. 7, § 103.)

While the precise question has not been decided by this Court, the recent case of *Maynard* v. *Elliott*, 283 U. S. 273, establishes the proposition that a claim based on a contract is not necessarily barred from proof because it is contingent. That a claim based on an express contract of indemnity is unliquidated is not a fatal objection to its being a provable debt.

Williams v. *U. S. Fidelity & Guaranty Co.*, 236 U. S. 549.

In the case at bar the petitioner's claim was liquidated within one month from the date of the act of bankruptcy, and before the petition in bankruptcy was filed. It is submitted that this claim, being founded on an express contract, was a provable claim on March 18, 1930, the date of the conveyance made by Teresa Marotta.

C. On the facts found by the District Court and the record in the case the Circuit Court of Appeals should have found and ruled that the petitioner was a creditor of Teresa Marotta when she transferred her property and when the petition was filed; that this transfer was made with intent to hinder, delay or defraud a creditor and was an act of bankruptcy; that the petitioner was entitled to maintain the petition; and that the respondent was properly adjudicated a bankrupt by the District Court.

Up to this point the case has been considered in this brief, as it was by the Circuit Court of Appeals, on the assumption that the petitioner had a provable claim against the respondent at least as early as April 18, 1930, when the petitioner paid the amount of the judgment which was obtained in the Ricci case.

The respondent claims, however, that she never became indebted to the petitioner under the indemnity agreement, and raises this and other issues in the assignments of error filed in her appeal from the decision of the District Court.

The Respondent's Assignments of Error, and Discussion of Issues Raised by Them.

Twenty-eight assignments of error were filed for the alleged bankrupt in connection with her appeal to the Circuit Court of Appeals (R. 44–47). These raise in various forms the following issues.

1. Whether the American Surety Company was a creditor of Teresa Marotta when the petition was filed (on July 16, 1930) having a provable claim of $500 or more (Assignments 3, 10, 11, 12, 13, 18, 19, 21, 26). It is not disputed that if the petitioner was a creditor its claim exceeded $500.

2. Whether the petitioner was a creditor at the time of the alleged act of bankruptcy (Assignments 4, 25).

3. Whether the conveyance of real estate made by Teresa

Marotta on March 18, 1930 constituted an act of bankruptcy (Assignments 20, 22, 23, 24, 27).

4. Whether the proceedings should be dismissed because the alleged bankrupt had only one creditor, the petitioner, at the time when the alleged act of bankruptcy was committed and at the time when the petition was filed (Assignments 5, 6, 7, 8, 9, 17).

5. Whether the petitioner was barred from maintaining the petition because at the time it was filed the petitioner had two bills in equity pending in the Superior Court for Suffolk County seeking to set the conveyance in question aside as fraudulent, in both of which notices had been filed in the Registry of Deeds, and in one of which a temporary injunction had been issued (Assignments 14–17).

6. Whether on the record the adjudication was warranted (Assignments 1, 2, 28).

It is submitted that the petitioner was a creditor of Teresa Marotta when she transferred her property, and was a creditor entitled to maintain the petition when the petition was filed; that the conveyance made by Teresa Marotta was an act of bankruptcy; and that the respondent was properly adjudicated bankrupt by the District Court. The issue as to whether the petitioner was a creditor when the transfer was made has already been discussed. The other issues are considered below.

1. The petitioner was a creditor of Teresa Marotta having a provable claim in excess of $500 at the date when the petition was filed; and was therefore qualified to maintain the petition irrespective of whether it had such a claim when the act of bankruptcy was committed.

The facts not in dispute show,

(1) Teresa Marotta on April 15, 1930 executed the indemnity agreement, Exhibit 6 (R. 90A) by which she agreed to in-

demnify the petitioner against any loss arising from execution of a fireworks bond for Mario Mogliani to run to the State of Massachusetts (R. 35).

(2) Relying on this indemnity agreement the petitioner, on April 18, 1927, executed the fireworks bond of which exhibit 1 (R. 86A) is a copy, except that the exhibit does not show the seal of the petitioner which was affixed to the original bond. This bond was filed with the Treasurer and Receiver General of Massachusetts in accordance with the requirements of the laws of Massachusetts (for the material portion of the statute see p. 34 below). The bond was conditioned on the payment by Mario Mogliani of any judgment obtained in an action against him for damage to persons or property resulting from the discharging of fireworks at any public exhibition, provided that the action was brought within twelve months of the exhibition (R. 36–38).

(3) On September 26, 1927 Beatrice Ricci was injured by the discharge of fireworks under the direction of Mario Mogliani at a public exhibition held at Everett, Massachusetts. On April 12, 1928 Beatrice Ricci brought an action against Mogliani in the Superior Court for Middlesex County, Massachusetts to recover for this injury. After a verdict in her favor for $10,000 which was reduced by the Court to $6,500, a judgment was entered in this action on April 10, 1930 against Mogliani for $6,540.08 with costs of $110.40 (Findings 19, 22, 23, 31, R. 38–41; see Exhibit 8, R. 91–103).

(4) Demand was made on Mogliani to pay the judgment. When he failed to do so suit was brought on the bond against the petitioner in the Municipal Court of the City of Boston in the name of the Treasurer and Receiver General for the benefit of Beatrice Ricci. After this suit was brought the petitioner, on April 18, 1930, paid the amount of the judgment to the attorney of record in the suit on the bond, who was also attorney of record for Beatrice Ricci in the suit against Mogliani (Finding 31, R. 41; Testimony of DiCecca, R. 59–60).

Although the foregoing facts are not in dispute, it is contended for the respondent that the petitioner is not a creditor of Teresa Marotta. The reasons assigned for this contention may be summarized as follows:

(a) The respondent claims that she was induced by fraud to execute the indemnity agreement, exhibit 6.

(b) The respondent claims that there was a failure of consideration because the instrument, exhibit 1, filed with the Treasurer and Receiver General was not within the terms of the indemnity agreement, exhibit 6, because it was not sealed by the principal.

(c) The respondent claims that the instrument filed with the Treasurer and Receiver General was not a bond, and the petitioner was therefore under no obligation to pay the judgment recovered by Beatrice Ricci against Mario Mogliani.

(d) The respondent claims that there was no evidence that the alleged bond executed by the petitioner was filed before Beatrice Ricci was injured.

These claims will be discussed in the order stated.

(a) The contention that the respondent was induced to execute the indemnity agreement by fraud is not supported by the facts.

The only testimony having any tendency to show that the respondent did not understand what she was doing, or that she was misled when she executed exhibit 6 was that of Mr. and Mrs. Marotta. The Special Master who heard the witnesses found specifically that the testimony of Mr. Marotta was far from reliable and that his alleged ignorance and that of his wife in connection with the signing of exhibit 6 is not credible (R. 15). He expressly declined to find that Antonio Natale (who was the only person accused of fraud in the testimony of the appellant and her husband) was guilty of any fraud, and he found that Natale was not an agent of the petitioner (R. 17). The District Court found that none of the persons present when this document was signed were agents of the Surety Com-

pany (Finding 9, R. 36). The Court also found that both Mr. and Mrs. Marotta knew the nature of the instruments which she signed (Finding 10, R. 36). The testimony of Arcangelo Marotta and of the respondent with respect to the circumstances under which she signed the indemnity agreement, exhibit 6, and the financial statement, exhibit 7, was contradicted in material respects by other witnesses (see testimony of William J. Good, R. 53–55, 80; Antonio Natale, R. 57–59, 81; Michael Vallanti, R. 82). The story told by Mr. and Mrs. Marotta is that Antonio Natale procured the signature of the respondent to the indemnity agreement, exhibit 6, and the financial statement exhibit 7, by representing to her that she was to become responsible on an attachment bond for $1000, and that when Mr. and Mrs. Marotta went to Mr. Good's office, where she signed these documents, the papers were there all prepared and she merely signed them and acknowledged them (R. 68–69, 73, 78–80). The cross-examination of Arcangelo Marotta however, showed conclusively that the financial statement, exhibit 7, contained information as to the real estate and its income which was known only to himself and his wife (R. 73). Mr. Good testified that he wrote down the details as to the property which appear in the financial statement, exhibit 7, from information furnished by the Marottas at the interview in question (R. 53–54). It also appeared that on March 15, 1928 Mr. Buss, the manager of the petitioner at Providence, sent a letter to Mrs. Marotta (Ex. 3, R. 87) in which he expressly referred to the indemnity agreement, exhibit 6, as an agreement to hold the petitioner harmless in connection with the bond for $15,000 required by the State of Massachusetts for the giving of a fireworks exhibition. This letter had at the top the file number used by the petitioner for this bond, 693033-B. On July 31, 1928, Arcangelo Marotta, acting for himself and as agent for his wife, wrote a letter to Mr. Buss, exhibit 4 (R. 88A) which referred to the same file number (which must have been copied from exhibit 3) and to an application for another bond made in

1928 for Antonio Natale and Mario Mogliani. On August 1, 1928 Mr. Buss sent a letter to Mr. and Mrs. Marotta (exhibit 5, R. 89) stating that the application for the later bond had not been used and again referring to the indemnity agreement signed by Mrs. Marotta in 1927 on behalf of Mr. Mogliani. The testimony of Mr. Marotta as to this correspondence is found at pages 70–71 in the record. Mr. and Mrs. Marotta had a daughter who could read English. There is no evidence that either Mr. or Mrs. Marotta ever questioned that Mrs. Marotta had executed such an indemnity agreement as is disclosed in the evidence until they testified at the trial.

If Mr. and Mrs. Marotta had thought that all that she signed was an indemnity agreement relating to an attachment bond for $1000, they would have said so promptly when they received exhibit 3 (R. 87), the letter of March 15, 1928, from Mr. Buss, which informed Mrs. Marotta that she had executed an indemnity agreement to hold the petitioner harmless in connection with a fireworks bond for $15,000, and that a claim had been made for injuries to Beatrice Ricci. Instead of that, Mr. Marotta, acting for himself and his wife, wrote the letter, exhibit 4 (R. 88A), referring only to a later bond (or application for a bond) which Mr. and Mrs. Marotta had signed for Natale and Mogliani.

There was also testimony in the case that $800 was paid to Arcangelo Marotta as consideration for Teresa Marotta's going on the bond in the case at bar (R. 57, 58, 82).

On the evidence which has been referred to, it is submitted that the findings against the respondent which were made in the District Court with respect to her claim of fraud were required by the evidence. As these findings were made by the trial court on conflicting evidence, they should not be disturbed on appeal.

Lawson v. *U. S. Mining Co.*, 207 U. S. 1, 12.
Butte & Superior Copper Co. Ltd. v. *Clark-Montana Realty Co.*, 249 U. S. 12, 30.

Harding v. *Federal National Bank*, 31 F. (2d) 914.
Boston National Bank v. *Early*, 17 F. (2d) 691.
Watchmaker v. *Barnes*, 259 Fed. Rep. 783.
In Re *Noyes Bros.*, 127 Fed. Rep. 286.

It is further to be observed that the testimony of Mr. and Mrs. Marotta that she had been misled by Natale, even if it had been believed, would not have voided her contract of indemnity. Natale, who procured the respondent's signature to the indemnity agreement was employed by Mogliani, the principal on the bond. He did not represent the petitioner. "The obligee's right to hold the surety does not depend on representations made by the principal on his own behalf without knowledge of the obligee." *Hudson* v. *Miles*, 185 Mass. 582, 587.

Rodovsky v. *Fall River Savings Bank*, 196 Mass. 557.
Martin v. *Campbell*, 120 Mass. 126.

The mere fact that Mrs. Marotta signed by a mark did not put the petitioner on notice that she did not understand the terms of the instrument. If such a contention were valid, no one could safely take title to a piece of land where any deed in the chain of title appeared from the records in the registry of deeds to be signed by a mark. Signature by mark was notice that Mrs. Marotta could not write her name; it was not notice that she had no information as to the nature of the instrument. Furthermore, the person who signs a written instrument cannot avoid its legal effect on the ground that he did not read it or understand it, in the absence of fraud on the part of the other party to the instrument.

Rodovsky v. *Fall River Savings Bank*, 196 Mass. 557.
Waverly Lumber Co. v. *Piantedosi*, 262 Mass. 377.
Wilkisius v. *Sheehan*, 258 Mass. 240.

The argument made in the Court below that the petitioner concealed the nature of the obligation from the respondent is

equally without merit. There is no evidence to support this contention. Furthermore, the defense of concealment is not available to a surety unless the surety's signature is procured by the creditor, or unless the creditor was present when the instrument was executed and then misrepresented or concealed essential facts.

Magee v. *Manhattan Life Ins. Company*, 92 U. S. 93.

(b) The contention of the respondent that there was a failure of consideration because the bond filed with the Treasurer and Receiver General was not sealed by the principal, and therefore was not the instrument contemplated by the indemnity agreement, cannot be sustained.

In the first place it should be noted that there are no express provisions in the indemnity agreement that the bond should take the form of an instrument to be executed *by the principal* under seal. A surety often gives a bond to guarantee the performance of a contract or a legal obligation by a principal who does not himself sign the bond. There is no doubt that the instrument which the petitioner executed was its bond. It was signed by the petitioner and sealed with its seal (R. 37-38).

Furthermore, although the indemnity agreement, exhibit 6, refers to the proposed undertaking as a "fireworks bond," it expressly provides on the second page that if the petitioner executes "the suretyship hereinbefore applied for, or other suretyship in lieu thereof," the indemnitor agrees to indemnify the petitioner. The agreement also contains the following provision:

> "VI. That this agreement shall cover not only the suretyship above recited, but all alterations, renewals, extensions or modifications thereof which may be requested or assented to by the principal named in such obligation."

There can be no doubt that the bond which was filed was either the one expressly contemplated by the indemnity agree-

ment, or a modification of it which was assented to by the principal. Mogliani, the principal, signed the bond which was filed, accepted it from the petitioner already signed and sealed by the petitioner, and caused it to be filed with the Treasurer and Receiver General (Findings 14–18, R. 37–38). It appears therefore that there is no basis for a claim that the bond which was filed was not an instrument contemplated by the indemnity agreement.

(c) The claim of the appellant that the instrument filed with the Treasurer and Receiver General was not a bond, and that the petitioner was therefore under no obligation to pay the judgment recovered by Beatrice Ricci against Mario Mogliani, cannot be sustained. The defect in the instrument on which the appellant relies is that there was no wafer opposite the name of Mario Mogliani, but only the word "Seal," which was printed on the form which was signed (See exhibit 1, R. 86A.)

Even if it be assumed that the principal should have sealed the document, and that he could not adopt the printed word "Seal" as his seal, it does not follow that the instrument did not bind the Surety Company. The Surety Company, acting through its representative Mr. Buss, delivered this instrument to Mogliani in the condition in which it now is, expecting that it would be filed in that condition with the Treasurer and Receiver General and intending to be bound by it in that condition. (See Special Master's report, R. 7–8, 18–19; Findings of the District Court 17–18, R. 37–38; testimony of Mr. Buss, R. 49–51, 55–57.) The instrument was signed and sealed by the petitioner (report of Special Master, R. 7–8; Finding of District Court 15, R. 37).

Under these circumstances it is clear that according to Massachusetts law, the petitioner was bound by the instrument.

Goodyear Dental Vulcanite Co. v. *Bacon,* 148 Mass. 542.

In the case cited, the principal failed to sign or seal the bond. The bond was given to secure accounting by the principal for

moneys for which he was legally responsible. The Court held that if the surety executed and delivered the instrument in the condition in which it appeared and intended to be bound by it, the surety was liable. In the case at bar, the obligation imposed by law on Mogliani to pay the judgment obtained by Beatrice Ricci corresponds to the obligation to account which was imposed by law on the principal in *Goodyear Dental Vulcanite Co.* v. *Bacon.* Both the case at bar and the case cited are to be distinguished from cases in which, unless the principal signs the instrument in question, he is under no obligation to anyone.

For other cases which hold that if a surety executes and delivers a bond which the principal has failed to sign, the surety is liable on the bond, if the principal is bound by law to perform the same obligation which is secured by the bond, see

Re *Cahill*, 48 Mich. 616.
Safranski v. *St. Paul, Minneapolis & Manitoba Railway Co.*, 72 Minn. 185.
Wild Cat Branch v. *Ball*, 45 Ind. 213.
cf. St. Louis Brewing Ass'n v. *Hayes*, 97 Fed. 859 (C.C.A. 5th circ.).

It is further to be noted that in the case at bar Mogliani was liable on the bond itself, even though he failed to place a seal upon it. The bond was one required by statute before he could lawfully give a public exhibition of fireworks.

The material provisions of the Massachusetts statutes are as follows:

> "Sec. 57C. No person engaged in the business of displaying or exhibiting fireworks shall, by himself or his agents, discharge, fire off, explode or display fireworks at any public exhibition or exhibitions thereof unless he has on file with the state treasurer a bond running to the state treasurer with a surety or sureties approved by him for the penal sum of fifteen thousand dollars, and for such addi-

tional penal sum as the state fire marshal shall determine to be necessary to cover the losses, damages or injuries that might ensue to persons or property by reason of said public exhibition or exhibitions. The bond shall be conditioned upon the payment of any judgment obtained in an action brought against said person so discharging, firing off, exploding or displaying fireworks at any public exhibition or exhibitions thereof, for or on account of any loss, damage or injury resulting to persons or property by reason of the said discharging, firing off, exploding or displaying of said fireworks at said public exhibition or exhibitions; provided that said judgment was obtained in an action brought within a period of twelve months following the date of the public exhibition at which the cause of said action is alleged to have occurred.

"Sec. 57D. Action on a bond filed under the provisions of the preceding section may be brought by any person or persons holding such judgment and may be brought by such person or persons in the name of the state treasurer but for the benefit and use and at the cost and expense of such person or persons so bringing the said action.

"Sec. 57G. Whoever violates any provision of the six preceding sections shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than six months, or both." (G. L. c. 148, secs. 57C, 57D and 57G, as amended by Acts of 1921, c. 500.)

Under these circumstances there was a sufficient consideration for the agreement of the principal contained in this bond so that he was liable upon it even though he did not seal it.

United States v. *Linn*, 15 Peters 290.
Inhabitants of Boothbay v. *Giles*, 68 Maine 160.

Incidentally it should be noted that the decision in *Boothbay* v. *Giles* indicates clearly that an instrument in the form of a bond signed by the parties and not sealed should be treated as given "in lieu" of a bond and would therefore be within the language of the indemnity agreement, exhibit 6, quoted above.

The legal situation with respect to this fireworks bond was therefore that the petitioner had signed and sealed a bond securing the performance of an obligation by the principal which was clearly described in the bond; that this obligation of the principal (namely, to pay any judgment rendered against him of the kind described in the bond) was one which was also imposed by law and could be secured by the petitioner's bond; and that Mogliani was also liable on the instrument itself as fully as though he had sealed it.

Accordingly it appears that the petitioner was liable on the bond and the payment of the amount of the judgment recovered by Beatrice Ricci was not a voluntary one.

(d) The respondent also contends that there was no evidence which would warrant the finding made in the Court below that the bond was filed with the Treasurer and Receiver General before September 26, 1927, the date on which Beatrice Ricci was injured. The Special Master found that the bond was filed before the accident (Report, R. 7–8). This finding was confirmed by the District Court (R. 37–38). These findings were based on the evidence produced in the case and on inferences properly drawn therefrom. Mogliani signed the bond in the presence of Mr. Buss on April 18, 1927, and told Mr. Buss that he was going to file it immediately at the State House in Boston (R. 49–50). The fair inference is that it was filed by Mogliani on or about the day he signed it, April 18, 1927. The bond was produced at the trial from the files of the Treasurer and Receiver General by the witness Cynthia W. Arey, who testified that there was no record in the Treasurer and Receiver General's office of the date of filing but it was presumably filed on April 18, 1927 (R. 48).

The witness Oliver B. DiCecca testified that he saw the bond in the office of the Treasurer and Receiver General sometime between September 26, 1927 and October 5, 1927 (R. 64).

The Massachusetts statutes provided that no person engaged in the business of displaying or exhibiting fireworks should dis-

charge or display them at any public exhibition unless he had such a bond on file. The presumption is that this bond was filed before the exhibition was given by Mario Mogliani at which Beatrice Ricci was injured. The law presumes every man, in his private and official character, does his duty, until the contrary is proved.

"It will presume that all things are rightly done, unless the circumstances of the case overturn this presumption according to the maxim, *omina presumuntur rite et solemnitur esse acta, donec probetur in contrarium.*"

The Bank of the United States v. *Danbridge et al*, 12 Wheaton 64, 69.

See also *Commonwealth* v. *Carr*, 143 Mass. 84.

Greenleaf on Evidence, 16th Ed. Ch. VI. Sec. 40.

One of the most common applications of this presumption of regularity occurs when evidence that a letter was stamped, addressed and mailed is held to warrant an inference that it was received.

The circumstances and evidence in the case at bar clearly warranted the finding made by the Special Master and confirmed by the District Court that the bond was filed with the Treasurer and Receiver General prior to September 26, 1927, the date of the fireworks accident. Under these circumstances the finding should not be set aside on appeal.

Lawson v. *U. S. Mining Co.*, 207 U. S. 1, 12.

Butte & Superior Copper Co. Ltd. v. *Clark-Montana Realty Co.*, 249 U. S. 12, 30.

Furthermore, it is difficult to see on what ground liability on this bond could be avoided if it were filed after the accident and before the judgment was obtained. The obligation in the bond is to pay the judgment. There is no term in the bond which makes it a condition precedent to recovery that the bond should be filed before the accident.

Cf. Choate v. *Arrington*, 116 Mass. 552.

The witness Oliver B. DiCecca found the bond on file at a date not later than October 5, 1927 (R. 64). The action of Beatrice Ricci was brought on April 12, 1928, and judgment in that action was entered on April 10, 1930 (Findings 22, 31, R. 38, 41).

For the reasons which have been set forth it is submitted that none of the defenses against liability on the indemnity agreement which have been set up by the respondent are valid, and that at the date when the petition in bankruptcy was filed, the petitioner was a creditor of the respondent having a provable claim in excess of $500.

e. If the petitioner had a provable claim when the petition was filed, it is not necessary that it should have had such a claim when the act of bankruptcy was committed.

Counsel for the respondent contended in the Court below that even if the petitioner had a provable claim when the petition was filed it had no standing to maintain the petition unless it also had a provable claim at the time of the alleged act of bankruptcy. There is a clear distinction between this proposition and the line of argument adopted by the majority decision in the Court below, which has already been discussed in this brief at pages 18–22. The position of the majority in the Circuit Court of Appeals is merely that a conveyance cannot be made with intent to defraud a creditor, within the meaning of the act, unless there is at least one creditor in existence at the time who has a provable claim. If there is such a creditor, the majority opinion apparently concedes that some other creditor whose claim becomes provable later may bring the petition (*cf.* R. 138). The proposition of counsel for the respondent is that a petitioning creditor cannot complain of an act of bankruptcy that occurred before he was a creditor having a provable claim.

It is submitted that this proposition is not supported either by the statute or by the weight of authority; and that even those decisions which support it recognize an exception in a case

like the one at bar where the conveyance was made with a specific intent to defraud the petitioning creditor.

The part of the Bankruptcy Act which applies is section 59b, printed at page 15 above. This provides that three or more creditors "who have provable claims against any person" (or one, if there are less than twelve creditors) "may file a petition to have him adjudged a bankrupt." The test, according to this section, is whether the petitioner has a provable claim when the petition is filed. To rule that the petitioner who meets this test may *not* file a petition unless he also meets another condition not laid down in the statute (namely, having a provable claim at the time of the act of bankruptcy) produces a result which in many cases would be directly contrary to the statute. It follows that no such ruling should be made.

The weight of authority is to the same effect. It is true that some early cases apparently approved the prosposition for which counsel for the respondent has contended. See

In re *Brinckmann*, 103 Fed. Rep. 65 (Dist. Ind. 1900).
In re *Callison*, 130 Fed. Rep. 987 (S. Dist. Fla. 1903).
Brake v. *Callison*, 129 Fed. Rep. 201 (C. C. A. 5th Circ. 1904).
In re *Stone*, 206 Fed. Rep. 356 (E. Dist. Pa. 1913).

The last three of these cases recognize an exception to the proposition in case of a conveyance made with a specific intent to defraud the petitioner. The whole proposition was attacked as contrary to the statute by the decision in the case of In re *Hanyan*, 180 Fed. Rep. 498 (S. Dist. N. Y. 1910). The more recent decisions support In re *Hanyan* in holding that it is sufficient if a petitioning creditor has a provable claim when the petition is filed.

In re *Van Horn*, 246 Fed. Rep. 822 (C. C. A. 3d Circ. 1917).
In re *H. E. Page Motor Car Co.*, 251 Fed. Rep. 318 (Dist. Mass. 1918).
In re *Western Gear Co.*, 53 F. (2d) 644 (E. Dist. Mich. 1931).

The last case cited was one in which a single creditor brought the petition. It seems obvious that the same rule should apply whether the petition is brought by three creditors or one. While the earlier editions of *Collier on Bankruptcy* supported the proposition that except in case of actual intent to defraud the petitioner, the petitioner is required to have a provable claim at the time of the act of bankruptcy (see quotation, In re *Stone*, 206 Fed. Rep. 356, 357), the last edition of this work recognizes that the weight of authority is to the contrary.

Gilbert's Collier on Bankruptcy, 2d ed. 1931, p. 845.

2. The conveyance of real estate made by Teresa Marotta on March 18, 1930, constituted an act of bankruptcy.

The material findings relating to this conveyance are contained in the record at pages 38–41. The testimony and exhibits relating to it are as follows: Arcangelo Marotta, R. 68, 74–78; Frank M. Zottoli, R. 60–62; exhibits 10, 11, 12, 13, 14, R. 110–119; exhibit 21, R. 130. See also, the Master's Report, R. 19–23).

The material provisions of the bankruptcy act are:

> "Section 3. Acts of Bankruptcy.— a. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; . . .
>
> "c. It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this title at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt."

At the date when the petition was filed, the respondent had no property in addition to the property which she had transferred on March 18, 1930 (Finding 30, R. 40; Master's Report, R. 23). Under the Bankruptcy Act, property which a person has conveyed with intent to hinder, delay or defraud his creditors is to be excluded in determining whether he is insolvent (§ 1 (15) printed above at page 16). Accordingly if, as has already been shown, the petitioner was a creditor when the petition was filed, it is clear that the respondent was then insolvent.

A copy of the deed of March 18, 1930, which constitutes the alleged act of bankruptcy, is printed as exhibit 10 (R. 110). This deed, which was executed by both Arcangelo Marotta and Teresa Marotta, conveyed three parcels. The first parcel, which is bounded by North and Lewis Streets, is described in the findings of the Court as the Lewis Street property (Findings 5, 26 and 28, R. 35, 39–40; *cf.* exhibit 7 at R. 90G; exhibit 10, R. 110; Master's Report, R. 6, 10–11). This Lewis Street property had belonged to Teresa Marotta when she entered into the indemnity agreement, exhibit 6, and is described in the first two items on the last page of the financial statement, exhibit 7 (Master's Report, R. 19–21, exhibits 6, 7, R. 90A–90G). Teresa Marotta had conveyed this property to her husband on February 23, 1928 (Finding 26, R. 39; exhibit 21, R. 130). The other two parcels included in the conveyance of March 18, 1930, consisted of land on Pleasant Street, Winthrop and land bounded by North, Lewis and Fulton Streets, in Boston, described in this case respectively as the Winthrop property and the Fulton Street property (Findings 5, 28, R. 35, 40; exhibit 10, R. 110). The Winthrop property had been conveyed to Teresa Marotta by James J. Earley by a deed dated May 1, 1919 (exhibit 19, R. 127). The Fulton Street property had been conveyed to her by deed of George L. Clark dated November 27, 1906 (exhibit 18, R. 125). Both the Special Master and the District Court found that the Winthrop property and the Fulton Street property belonged to Teresa

Marotta when she made the deed of March 18, 1930 (Master's Report, R. 19–21; Finding 25, R. 39).

The Special Master and the District Court have also found that this conveyance was made with the specific intent of putting the property beyond the reach of the appellee and with the intent to hinder, delay and defraud the appellee (Master's Report, R. 23; Finding 30, R. 40).

The evidence relating to these findings is found in the record as follows: Frank M. Zottoli, R. 60–62; Pellegrino Muollo, R. 65; Marciano Grella, R. 65–66; Nicola Dello Russo, R. 65; Arcangelo Marotta, R. 66–68, 70–78; William E. Bennett, R. 83–84; and in the exhibits referred to below.

It appears that shortly before the Ricci suit against Mogliani was reached for trial, Arcangelo Marotta had a talk with Mr. Bennett, who was representing Mogliani, in which Arcangelo Marotta was told that Mrs. Marotta was on the bond, that the case was about to go to trial and that a verdict for a very large sum was likely to be rendered. Arcangelo Marotta attended the trial, which lasted several days and resulted in a verdict for $10,000 against Mogliani on March 4, 1930. Arcangelo Marotta consulted his own attorney, Mr. Fralli, during the trial and had an interview with Fralli on the night of the verdict at which he stated that his wife had signed a paper. Fralli told Marotta that "if they lose the case, we have got to pay for it." Fralli went to Providence to see Mr. Buss to ascertain how the papers were made out and when he got back reported to Arcangelo Marotta (Findings 22, 23, R. 38–39; Master's Report, R. 9–10; Testimony of William E. Bennett, R. 83–84; Frank P. Fralli, R. 83; Arcangelo Marotta, R. 76–78, *cf.* R. 72).

On March 15, 1930, eleven days after the verdict in the Ricci suit, Arcangelo Marotta, acting as agent for Teresa Marotta, went to one Zottoli, a lawyer. In consequence of the talk between them, Zottoli prepared the deed of March 18, 1930, from Arcangelo Marotta and Teresa Marotta to Pellegrino Muollo, which is the conveyance already described which is alleged to

be the act of bankruptcy (exhibit 10, R. 110). As has been stated above, this deed covered the Winthrop property and the Fulton Street property, which was all the property which Mrs. Marotta then had, and also the Lewis Street property which she had owned when she signed the indemnity agreement and had conveyed to her husband in 1928. Zottoli also prepared a mortgage from Muollo to one Grella on the Winthrop property for $8,000, a mortgage from Muollo to one Dello Russo on the Lewis Street property for $20,000, a deed from Muollo to Arcangelo Marotta of all the properties, subject to the mortgages, and a declaration of trust by which Arcangelo Marotta declared that he held the property in trust for the children of Mrs. Marotta and himself. The declaration of trust is dated three days before the deeds (Findings 27–29, R. 39–40; Master's Report, R. 10–12; exhibits 11, 12, 13 and 14, R. 112–120). The instruments described were all executed and recorded together on March 19, 1930. All of the conveyances were made without consideration and both Muollo, the grantee, and the two mortgagees were straws who acted as a favor to and at the request of Arcangelo Marotta (Finding 30, R. 40; Master's Report, R. 11–12).

The contentions of the respondent with respect to this question, as disclosed in the assignments of error, may be summarized as follows:

a. That the petitioner was not a creditor at the date of the conveyance, as no final judgment had then been entered in the Ricci suit and the petitioner had then paid nothing; and that as Teresa Marotta then had no other creditors, her conveyance could not have been made with intent to hinder, delay and defraud creditors (Assignments 4, 25, 27, R. 44, 47).

b. That there was no evidence that Teresa Marotta knew that she had signed an indemnity agreement until April, 1930, which was after the date of the conveyance, and, therefore, that at the date of the conveyance she did not know that she had

any creditors and could not have intended to hinder, delay or defraud her creditors (Assignments 22 and 23, R. 47).

c. That Teresa Marotta held the real estate standing in her name on an oral trust for her husband and, therefore, it was not her property which was conveyed (Assignment 24, R. 47).

The first of these contentions, which was sustained by the Circuit Court of Appeals, has already been discussed in this brief at pages 18–24.

The next contention of the respondent, which is that she did not know of the existence of the indemnity agreement until April, 1930, after the date of the conveyance, is entirely inconsistent with the evidence. As has already been shown, the District Court properly found that when she executed the indemnity agreement she knew the nature of the instrument she signed. It further appears that in March, 1928, she had been notified by the letter, exhibit 3, of the accident to Beatrice Ricci and of her own indemnity agreement; and that Arcangelo Marotta, acting as her agent had oral notice from Mr. Bennett of the pending trial of the Ricci suit and of Mrs. Marotta's liability on the bond, before March 4, 1930 (Finding 22, R. 38; Master's Report, R. 9–10, 14–15; testimony of Wm. E. Bennett, R. 83–84; Exhibits 3–5, R. 87–89). The findings and the evidence, therefore, do not support the alleged ignorance on the part of Teresa Marotta on which this contention is based.

The contention of the respondent that she held the real estate standing in her name under an oral trust for her husband, and therefore that it was not her property that was conveyed, is inconsistent with the findings in the case. The Special Master and the District Court have both found that it was her property (Master's Report, R. 6, 20–21; Finding 25, R. 39). The only testimony to the contrary was that given by Mr. and Mrs. Marotta. The Special Master has expressly found that their testimony given in connection with the signing of the indemnity agreement is not credible (Master's Report, R. 14–15). The financial statement which was signed by Mrs. Marotta for the

purpose of inducing the Surety Company to execute the fireworks bond lists the property in question as hers (exhibit 7, R. 90D–90G). Mrs. Marotta had, while she held this property, gone on another fireworks bond and a bail bond as the owner of the real estate (Master's Report, R. 21; Arcangelo Marotta, R. 74; Teresa Marotta, R. 79–80; Antonio Natale, R. 57–58). Arcangelo Marotta testified that when he was first approached by Natale concerning the bond now in question he told Natale that he would have to see his wife, that his wife had the property (Arcangelo Marotta, R. 68–69). Under these circumstances the District Court was fully warranted in finding that the property belonged to the wife.

The fact that Mr. Marotta paid the consideration for the conveyances which were made to his wife in 1906 and 1919 does not show that these transfers were received by her in trust for him; for the presumption is that the property was received as a gift and might be applied for the use and benefit of either or both the spouses.

Pollock v. *Pollock*, 223 Mass. 382.
English v. *English*, 229 Mass. 11.
Edgerly v. *Edgerly*, 112 Mass. 175.
Cairns v. *Colburn*, 104 Mass. 274.

This presumption must prevail unless it is rebutted by clear evidence.

English v. *English*, 229 Mass. 11.

The only evidence to rebut it is the unsupported testimony of Arcangelo Marotta and Mrs. Marotta. Neither of these is a credible witness. In addition to the interest which they have in the case, there is affirmative evidence already referred to, showing them to be utterly unreliable.

Under these circumstances the finding of the Court below that the wife owned the property was the logical deduction from the evidence. Furthermore, as it was made on conflicting testi-

mony after hearing the witnesses, it should not be reversed on appeal.

There is another aspect of the matter, however, in which it becomes quite immaterial who actually owned the property in question. Both Arcangelo Marotta and Teresa Marotta represented that it was her property for the purpose of inducing the Surety Company to execute the bond. Arcangelo Marotta furnished Mr. Good with the information contained in the financial statement, exhibit 7, which showed the property as belonging to the wife. Mrs. Marotta signed that statement. The petitioner executed the bond in reliance on it (Arcangelo Marotta, R. 73; Buss, R. 51; Finding 16, R. 37; William J. Good, R. 53–55). Both of the Marottas, are, therefore, estopped to assert that the property did not belong to Mrs. Marotta.

Silver v. *Roberts Garage, Inc.*, 240 Mass. 571.
Rioux v. *Cronin*, 222 Mass. 131, 135.
North Shore Blue Book Inc. v. *Burlen*, 256 Mass. 431.

3. The fact that the alleged bankrupt had only one creditor when the act of bankruptcy was committed and when the petition was filed is not a valid reason for dismissing the petition.

The respondent claimed in the Circuit Court of Appeals that a single creditor is not entitled to prosecute an involuntary petition in bankruptcy unless there are other creditors in existence, and that if there are no other creditors the Court should dismiss the petition either as a matter of discretion or as a matter of law.

There is nothing in the Bankruptcy Act which supports this contention. The Act expressly authorizes one creditor to bring a petition when the creditors are less than twelve in number, and makes no exception to the effect that one creditor cannot bring a petition if there are not at least two creditors. (See § 59 b, printed at page 15 above.) No such exception can

properly be interpolated into the Act. In this connection it should be noted that under the provisions of section 59a, which reads: — "Any qualified person may file a petition to be adjudicated a voluntary bankrupt," it has been the practice to accept voluntary petitions alleging the existence of only one creditor and to administer estates in bankruptcy upon such petitions.

Usually a petitioner in a contested involuntary bankruptcy cannot know until the trial is over how many creditors the bankrupt has. It would be a harsh rule which would give a fraudulent bankrupt the chance to try all the issues, and after they had been decided against him, to escape adjudication merely because he had one creditor instead of two. It may well be that one of the purposes of the bankruptcy act is to obtain an equal distribution among creditors when there are several. The provisions with reference to preferences are intended for such a purpose. It is equally true that another purpose is to give effective remedies where the bankrupt has transferred or concealed his property with the intent of not paying any creditor. That purpose applies equally to a case where there is a single creditor and to a case where there are several.

4. The petitioner is not barred from maintaining the petition because of the bills in equity which it brought in the state court.

Within four months before the petition in bankruptcy was filed the petitioner brought bills in equity in the Superior Court of Massachusetts to have the conveyances of March 18, 1930, set aside as fraudulent and to reach the real estate which was conveyed (Findings 32, 33, R. 41). A temporary injunction was issued in one of these cases against Arcangelo Marotta and the straw mortgagees, restraining them from conveying or encumbering the real estate or foreclosing the mortgages.

These suits have not been tried and are still pending. The respondent contends that these suits and the equitable attachment made in one of them are a bar to the petitioner in the present case (Assignments 14–17, R. 45–46).

This contention is not supported by either the language of the Bankruptcy Act or the decided cases. Section 59b of the Bankruptcy Act (printed at page 15 above) provides that three or more creditors *who have provable claims* (or one, if there are less than twelve creditors) may file a petition against a person. Section 63 of the Act (printed at page 23 above) defines a provable claim in terms which would include the claim which the petitioner had when the petition was filed (see pages 23–24 above). The material portions of other sections of the Bankruptcy Act which should be considered are as follows:

> "Sec. 57. Proof and allowance of claims. — a Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so, what securities are held therefor, and whether any, and, if so, what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.
>
> "g The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditor shall surrender such preferences, conveyances, transfers, assignments, or incumbrances." (Act of July 1, 1898, c. 541, § 57, 30 Stat. 560; Feb. 5, 1903, c. 487, § 12, 32 Stat. 799; U. S. Code, title 11, § 93.)
>
> "Sec. 60. Preferred Creditors.— b If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing

thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." (Act of July 1, 1898, c. 541, § 60, 30 Stat. 562; Feb. 5, 1903, c. 487, § 13, 32 Stat. 799; June 25, 1910, c. 412, § 11, 36 Stat. 42; U. S. Code, title 11, § 96.)

Sec. 67. Liens.— e That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. . . .

"f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judg-

ment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry." (Act of July 1, 1898, c. 541, § 67, 30 Stat. 564; Feb. 5, 1903, c. 487, § 16, 32 Stat. 800; June 25, 1910, c. 412, § 12, 36 Stat. 842; U. S. Code, title 11, § 107.)

The petitioner has no voidable preferences as defined by § 60b, and holds nothing conveyed to it in fraud of creditors such as is described in § 67e. It appears, therefore, that the statute does not sustain the respondent's contention.

The decisions show also that the petitioner is not disqualified. What the petitioner holds is at most an equitable attachment which will be destroyed under the provisions of §67f unless the Bankruptcy Court elects to keep it alive for the benefit of the estate. Furthermore the petitioner offers in the petition to surrender any attachment which it may hold for the benefit of the estate. Even if the petitioner had received a preference, it would be entitled to maintain the petition on compliance with such order as the court might make for surrender of the preference.

In re *Automatic Typewriter & Service Co.*, 271 Fed. Rep. 1 (C. C. A. 2d Circ.).

Greenville Banking & Trust Co. v. *Selcow*, 25 F. (2d) 78 (C. C. A. 3d Circ.).

In re *Hornstein*, 122 Fed. Rep. 266.

In re *Murphy*, 225 Fed. Rep. 392.

In the case at bar the automatic destruction of the attach-

ment in accordance with sec. 67f (unless the court elects to keep it alive) will amount to a surrender.

Keppel v. *Tiffin Savings Bank*, 197 U. S. 356.

The proceedings which the petitioner brought in the State court were intended to preserve the property for the trustee in bankruptcy by guarding against the danger that it, or the straw mortgages upon it, might be transferred to *bona fide* purchasers. Under these circumstances it is probable that the Bankruptcy Court would elect to preserve the equitable attachment for the benefit of the estate in bankruptcy. In the event, however, that the Court is of the opinion that it should be discharged by some document to be signed by the petitioner, the petitioner is ready to execute any such document.

So far as the respondent's objection based on the suits in the State court may depend on the doctrine of *lis pendens*, there are conclusive answers to it. The pendency of a suit in a State court is no bar to proceedings concerning the same matter in a Federal court having jurisdiction.

McClellan v. *Garland*, 217 U. S. 268, 282.
Gordon v. *Gilfoil*, 99 U. S. 168, 178.
Kline v. *Burke Construction Co.*, 260 U. S. 226, 234.

This is the rule even in cases in which the Federal courts would have concurrent jurisdiction with the State courts. There is an additional reason for its application where the relief sought is one which the United States court alone has jurisdiction to give.

Photo Drama Motion Picture Co. Inc. v. *Social Uplift Film Corporation*, 213 Fed. 374.

A further objection to the respondent's contention is that this particular defence, if it were otherwise valid, would be in the nature of a plea in abatement, and is not available to the respondent, who has gone to trial on the merits without pleading it or raising the question on a motion to dismiss.

5. The general contentions of the respondent that on the record the adjudication was not warranted and was erroneous in law, are not supported.

These contentions are stated in the form of general conclusions without further specifications (Assignments 1, 2 and 28, R. 44–47). The questions raised by these assignments have already been covered in the argument relating to the more specific assignments of error.

VI.

CONCLUSION.

For the reasons which have been stated it is submitted that the decree of the Circuit Court of Appeals should be reversed and that the decree of the District Court adjudicating the respondent a bankrupt should be affirmed.

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